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24 *Ultimate Fighting Championship and UFC*

25 UNITED STATES DISTRICT COURT

26 DISTRICT OF NEVADA

27 Cung Le, Nathan Quarry, Jon Fitch, Brandon
28 Vera, Luis Javier Vazquez, and Kyle
Kingsbury on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

Zuffa, LLC, d/b/a Ultimate Fighting
Championship and UFC,

Defendant.

Case No.: 2:15-cv-01045-RFB-(PAL)

**DECLARATION OF MARCY
NORWOOD LYNCH IN SUPPORT OF
ZUFFA, LLC'S OPPOSITION TO THE
MOTION TO CHALLENGE PRIVILEGE
DESIGNATION**

1 I, Marcy Norwood Lynch, declare as follows:

2 1. I am an attorney admitted to practice before the courts in the states of Florida and
3 New York and am admitted Pro Hac Vice to practice before this Court. I am Counsel in the law
4 firm Boies, Schiller & Flexner LLP, counsel to Defendant Zuffa, LLC ("Zuffa") in this case.

5 2. I make this declaration in support of Zuffa's Opposition to Plaintiffs' Motion to
6 Challenge Privilege Designation. I have personal knowledge of the contents of this declaration
7 and could and would testify thereto.

8 3. As part of ongoing discussions regarding the testing and sufficiency of search
9 terms, Zuffa has agreed to informally provide Plaintiffs with certain sample documents from
10 Zuffa's e-mail collection in this case. The parties agreed on conditions under which the sample
11 documents would be provided. On February 2, 2016, counsel for Plaintiffs, Michael Dell'Angelo,
12 sent me and others an email setting out the parties' agreement for the provision of the first set of
13 sample documents, which included: "The Parties agree that the Non-Hits will be produced for
14 sampling purposes only, will not constitute a waiver, do not need to be endorsed prior to
15 production, will be treated as Attorneys Eyes Only and will be returned not later than 48 hours
16 after the Court's order regarding the applicability of search terms, unless otherwise agreed by the
17 parties in writing."

18 4. After the last Status Conference, the parties agreed that Zuffa would provide an
19 additional 2,000 sample documents to Plaintiffs using Plaintiffs' sampling protocols. On April 4,
20 Zuffa provided 1,817 sample documents to Plaintiffs. Zuffa provided the remaining 183 sample
21 documents on April 5.

22 5. In providing the April 4 sample documents, I confirmed by email to Plaintiffs'
23 counsel the conditions under which Zuffa was providing the samples to Plaintiffs: "These sample
24 documents are produced for sampling purposes only, will not constitute a waiver of Zuffa's
25 positions regarding responsiveness, attorney-client privilege, work product, or other applicable
26 privileges, are not being endorsed, will be treated by Plaintiffs as Highly Confidential-Attorneys'
27 Eyes Only under the Protective Order, and will be returned no later than 48 hours after the
28

1 Court's order regarding the applicability of search terms, unless otherwise agreed by the Parties in
2 writing." The documents provided to Plaintiffs on April 5 were produced under the same
3 conditions.

4 6. On April 8, Plaintiffs sent Zuffa a letter regarding the 2,000 sample documents,
5 and questioned whether Plaintiffs' protocols had been correctly applied to the sample. Although
6 Zuffa disagreed with certain of the issues raised in Plaintiffs' letter, Zuffa decided on its own
7 accord to provide Plaintiffs with an additional 2,000 sample documents in order to ensure that
8 Plaintiffs' stated concerns would not be an obstacle to the parties' discussions regarding search
9 terms.

10 7. Zuffa provided Plaintiffs with an additional 1,999 sample documents on April 25
11 and the 1 remaining sample document on April 26.

12 8. As with the prior samples, I confirmed in an email to Plaintiffs' counsel that Zuffa
13 provided the sample documents under the following conditions: "These sample documents are
14 produced for sampling purposes only, will not constitute a waiver of Zuffa's positions regarding
15 responsiveness, attorney-client privilege, work product, or other applicable privileges, are not
16 being endorsed, will be treated by Plaintiffs as Highly Confidential-Attorneys' Eyes Only under
17 the Protective Order, and will be returned no later than 48 hours after the Court's order regarding
18 the applicability of search terms, unless otherwise agreed by the Parties in writing."

19 9. The April 25 sample set included the document at issue in Plaintiffs' Motion to
20 Challenge Privilege Designation, which was identified in the sample production as
21 MMERSCH00066967. At 8:03 p.m. Pacific Time the night before the Joint Status Report was
22 due, Plaintiffs sent an email with 15 exhibits that Plaintiffs said they intended to include as
23 exhibits to the Joint Status Report. Among these 15 exhibits was MMERSCH00066967.

24 10. At 8:50 a.m. Pacific Time on April 29, I sent Plaintiffs an email informing them
25 that MMERSCH00066967 was privileged, that it had been inadvertently produced, and that Zuffa
26 was clawing the document back as provided for under the Protective Order.

1 11. Plaintiffs' counsel responded that they "question whether the terms of the
2 Protective Order apply to the sample documents as you have asserted them." Plaintiffs agreed to
3 remove the exhibit "on one condition. That is, if Defendant is invoking the Protective Order to
4 claw back MMERSCH00066967, Defendant must also agree that the Protective Order applies to
5 Plaintiffs' right to challenge the clawback and privilege designation."

6 12. I responded that Zuffa's position was that "Plaintiffs will have a right to challenge
7 Zuffa's privilege designation of this document at the time that it is formally produced and/or
8 listed on Zuffa's privilege log, subject to the parties' further discussion of legal custodians."

9 13. Plaintiffs' counsel responded, "We reject the notion that in producing the
10 document Defendant can require that it will be 'treated by Plaintiffs as Highly Confidential-
11 Attorneys' Eyes Only under the Protective Order' and that Defendant can claw the document
12 back pursuant to the Protective Order, but Plaintiffs cannot challenge the designation or claw back
13 pursuant to the Protective Order." Plaintiffs indicated their intent to assert a challenge of this
14 document under the Protective Order.

15 14. After the e-mail correspondence described in Paragraphs 10-13 above, I did not
16 receive any further correspondence from Plaintiffs, or engage in any further discussions with
17 Plaintiffs, regarding this document or Plaintiffs' intention to challenge the inadvertent production
18 of the document. To the best of my knowledge, Plaintiffs did not further discuss this issue or seek
19 to meet and confer with counsel for Zuffa regarding the subject matter of their Motion.

20 15. I have investigated the circumstances regarding the provision of sample document
21 MMERSCH00066967. This document was properly coded as privileged by the attorney who
22 reviewed the documents as part of the sample document review. Although the document was in
23 the set of sample documents to be redacted prior to provision to Plaintiffs, the redactions that
24 should have been included on this document either were not added or failed to save to the
25 document prior to its production to Plaintiffs.

26 16. Exhibit A is a true and correct copy of sample document MMERSCH00066967
27 that includes a date and time stamp.
28

1 17. Exhibit B is a true and correct copy of produced document ZFL-0146240.
2 Pursuant to Rule 5.2 of the Federal Rules of Civil Procedure and LR IC 6-1, the athlete's Social
3 Security number has been redacted from page 22 of this document.

4 18. Exhibit C is a true and correct copy of produced document ZFL-0945636 and one
5 of its attachments, ZFL-0945637-61.

6 19. Exhibit D is a true and correct copy of produced document ZFL-0827826 and its
7 attachment, ZFL-0827868.

8 20. Exhibit E is a true and correct copy of produced document ZFL-0945364.

9 21. Exhibit F is a true and correct copy of produced document ZFL-0146593.

10 * * *

11
12 I declare under penalty of perjury under the laws of the United States of America that the
13 foregoing facts are true and correct. Executed this 13th Day of May, in Issaquah, Washington.

14 
15 Marcy Norwood Lynch